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IN THE
SUPREME COURT OF THE UNITED STATES
1996 TERM

WAYNE A. LUNDQUIST, JR., PETITIONER

-VS-

PREMIER FINANCIAL SERVICES-TEXAS, L.P.,
RESPONDENT

BRIEF IN OPPOSITION

TO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Petitioner was denied due process of law as a result of:

(a) the District Court granting leave to amend pleadings such that a "live" pleading existed by which defense of a motion for summary judgment could be supported; and

(b) thereafter, striking the entire pleading, including the authorized and allegedly, unauthorized amended pleadings of the affirmative defenses of waiver and equitable estoppel, as a result of the Honorable District Court's mistake that the Honorable District Court had not authorized the pleading of "waiver"; and

(c) thereafter, entering a summary judgment as a result of the "*death penalties*" order striking the pleadings which otherwise (that is, with the Amended Pleadings) was not appropriate as a matter of law.

Whether the District Court erred in granting summary judgment against Lundquist's where the record is replete with summary judgment evidence illustrating material fact issues

RECORD EXCERPT DEFINITIONS

"Tr" refers to the page number in the Record.

"ARE" refers to the tab number of the Appellant's Record Excerpts

"RE" refers to the tab numbers of the Appellee's Record Excerpts.

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STATEMENT OF THE CASE

A. Statement of Facts

On or about October 24, 1983, Nueces Development Company executed and delivered to Victoria Savings Association, F.S. A. a promissory note ("Note") in which it promised to pay to the order of Victoria Savings Association, F.S.A., the principal sum of $ 793,000.00 together with interest thereon on or before the expiration of 365 days from the date of the execution of the Note. [Tr. 909]. The Note was subsequently renewed and extended by various extension and renewal agreements dated November 21, 1984, July 24, 1985, July 22, 1986, and March 30, 1987. [Tr. 947-970]. Pursuant to the terms of the last extension and renewal agreement, the Note matured on September 19, 1987. [Tr. 964].

On October 24, 1983, Nueces Development Company executed and delivered a Deed of Trust Security Agreement-Financing Statement conveying to the Trustee for the benefit

of Victoria Savings Association, F.S.A. and its successors and assigns certain property as security for the debt owed on the Note. [Tr.935-946]. Further, on that same date, Wayne A. Lundquist, Jr. ("Lunquist'"), along with others by and through a Guaranty Agreement ("Guaranty"), individually guaranteed in writing the payment of the indebtedness evidenced by the Note. [Tr. 914-834; ARE 16}

The Resolution Trust Corporation ("RTC") was appointed conservator of Victoria Savings Association, F.S.A. on June 29, 1989. [Tr. 907]. On December 11, 1990, in its capacity as conservator of Victoria Savings Association, F.S.A., the RTC made demand upon Nueces Development Company and Lunquist for the payment of the Note. [Tr. 1553]. Both Nueces Development Company and Lunquist failed to meet such demand. [Tr. 1043: 1489]. As a result, the RTC proceeded with the foreclosure sale of the secured property pursuant to the terms of the Deed of Trust. [Tr. 971-

977]. The property sold at public auction for the sum of $161,028.00 [Tr. 509]. After the application of the sale price to the unpaid balance on the Note, a balance of $606,345.08 remained dued and owing on the Note, including principal interest and attorney's fees. [Tr. 907-908]. On October 25, 1991, Victoria Savings Association, F.S.A. failed, and the RTC as conservator for Victoria Savings Association, F.S.A. was replaced with the RTC as receiver for Victoria Savings Association, F.S.A. [Tr. 486]. On December 30, 1993, the RTC as receiver for Victoria Savings Association, F.S.A assigned the Note and Guaranty along with all right, title and interest therein to Premier Financial Services-Texas, L.P. ("Premier"). [Tr.908]

B. Course of Proceedings and Disposition in Court Below

On December 16, 1994, Premier filed suit against Lundquist based on his Guaranty of the Note [Tr. 1627]. On

June 16, 1995, Lundquist moved for summary judgment on his usury allegations. [Tr. 1135] On July 24, 1995, the district court denied Lundquist's motion. [Tr. 1031]. On September 20,1995, Premier moved for summary judgment on its entire claim against Lundquist. [Tr. 900]. On October 13, 1995, Premier supplemented its motion for summary judgment with a reply to Lundquist's response to Premier's motion for summary judgment. [Tr. 761]

At the time of the filing of Premier's motion for summary judgment, Lundquist's first amended answer and counterclaim was the only pleading before the court. [Tr. 989; 1164;1215;1415;1426]. In this answer, Lundquist raised the following affirmative defenses to Premier's cause of action: (1) the Texas four year estatute of limitations or in the alternative the doctrine of laches barred Premier's suit; (2) wrongful foreclosure; and (3) usury. [Tr. 1418]. In his counterclaim, Lundquist asserted that the Guaranty was

usurious on its face. [Tr. 1418]. On December 4, 1995, the district court granted Premier's Motion for Summary Judment. [Tr. 518].

SUMMARY OF THE ARGUMENT

This Honorable Court should deny Lundquist's petition for writ of certiorari because Lundquist was not denied due process of law and is liable on his Guaranty. The trial court, in its discretion, struck three of Lundquist's amended answers and counterclaims due to Lundquist's failure to meet pleading deadlines, failure to obtain leave, failure to adhere to the court's leave when the same was granted, and repeated attempts to assert affirmative defenses and counterclaims which he had abandoned by pleading amendment or motion to withdraw. The pleadings were struck only after Lundquist was given ample opportunities to cure the defects in the amendments. The trial court did not

abuse its discretion in striking the amended pleadings filed by Lundquist or deny him due process of law.

In addition, even if such stricken pleadings were permitted to be filed and considered, the petition should be denied because Lundquist's affirmative defenses are barred as a matter of law. *See*, Halbert v. City of Sherman, Tex., 33 F.3d. 526 (5th Cir. 1994) (Even though denial of leave to amend was error, case would not be remanded due to waste of judicial resources since appellant's claims fail as a matter of law). The Fifth Circuit Court of Appeals correctly affirmed the judgment of the district court that Lundquist is liable on his Guaranty. Each of Lundquist's arguments is contrary to the express terms of the Guaranty and well-settled case law. Lundquist relies on an improper construction of the Guaranty for his assertions that he is not liable for future extensions and renewals of the Note and for his affirmative defense and counterclaim of usury. The Guaranty and the Note specifically

address extensions and renewals and Lundquist expressly consented in advance to the same. Lundquist argues that the Guaranty could be construed to hold him liable if the Note was fully paid and thus is usurious on its face. However, the Guaranty does not evidence any such intention and the Note, which is incorporated into the Guaranty, contains a usury savings clause. The express language of the Guaranty waives each of Lundquist's live and/or stricken affirmative defenses of waiver, laches, estoppel and wrongful foreclosure.

ARGUMENT

A. Lundquist was not denied due process of law.

Lundquist argues that he was denied due process of law because the District Court struck all of his amended pleadings responsive to Premier's second amended complaint even though the court had already entered an order permitting Lundquist to amend his answer. Lundquist, however, was not denied due process, but on the contrary, was given ample

opportunities to comply with the order permitting the amendment but, instead, failed to comply with procedure and abused his privilege.

The Federal Rules of Civil Procedure provide that, after an answer has been filed, a party may amend the party's pleading "only by leave of court." *Fed.R.Civ.P. 15(a)* Moreover, although Rule 15(a), Fed.R.Civ.P. also provides that leave to amend shall be freely given when justice so requires, "**leave to amend is by no means automatic**." Halbert v. City of Sherman, Tex., 33 F.3d. 526, 529 (5th Cir. 1994) (emphasis added).

Lundquist attempted to file a second amended answer and counterclaims two months after the pleading deadline of July 21, 1995 and without a motion for leave of court to amend. [Tr. 1455; 1446; 882] Although Lundquist's second amended answer was properly struck by the District Court for failure to request leave and show good cause therefor,

Lundquist was granted leave to file a third amended answer asserting only certain defenses, for which he did not comply. Lundquist repeatedly failed to comply with the order granting leave and twice filed amended answers exceeding the scope of the order.

Lundquist was given due process of law; he simply did not like the results. Lundquist had fair notice of the pleading deadlines and knew the consequences of failing to comply with same. The consequences of the struck pleadings are a result of Lundquist's bad faith actions and not a denial of due process. Lundquist was denied leave to amend his fourth amended answer and his pleadings were struck only after he failed to comply with procedure and was subsequently given several chances by the District Court to amend his pleadings to conform with court orders and failed. Lundquist had his opportunity to be heard and abused it.

The cases cited by Lundquist do not support his position that he was denied due process. The cases merely set forth the general requirement of due process which is the *opportunity to be heard*. Lundquist, however, was not denied an opportunity to be heard. A review of the pleading history of this case reveals that the district court gave Lundquist several opportunities to be heard.

On December 16, 1994, Premier sued Lundquist. [Tr. 1627]. On January 27, 1995, Lundquist filed an Answer. [Tr. 1575]. On April 20, 1995, the court granted Lundquist's oral motion to withdraw his counterclaims against Premier. [Tr. 1456-1457]. The court also ordered Lundquist to respond to Premier's Motion to Strike Defendant's Affirmative Defenses on or about April 28, 1995 and set a pleading amendment deadline of July 21, 1995. [Tr. 1455;1446]

Lundquist did not respond to Premier's motion to strike on April 28, 1995 as ordered by the court. [Docket

Sheet, p.6], but instead requested an extension of two business days to file a brief which the trial court granted on May 4, 1995. [Tr. 1436; 1438]. Rather than file a responsive brief as requested and as ordered by the court, on May 4, 1995, Lundquist's moved for leave to file a First Amended Answer, Affirmative Defenses and Counterclaim. [Tr. 1426]. In this motion, Lundquist indicated that he intended to withdraw his counterclaims for breach of contract and wrongful foreclosure. [Tr. 1426]. Lundquist also indicated that he intended to omit the affirmative defenses of failure of consideration, estoppel and laches. [Tr. 1426]. Lundquist's First Amended Answer, Affirmative Defenses and Counterclaim asserted 1) statute of limitations; 2) improper foreclosure; 3) discharge; and 4) usury. Lundquist abandoned the affirmative defenses asserted in his original answer of 1) failure of consideration; 2) estoppel; 3) interference with collateral; 4) ambiguous and unenforceable guaranty; and 5) impossibility of performance

Lundquist also appeared to abandon his counterclaims for breach of contract, mental anguish and wrongful foreclosure. [Tr. 1426].

On May 5, 1995, Premier moved for leave to file a second amended complaint in order to add a party defendant. [Tr. 1327]. On June 14, 1995, the trial court granted Premier's motion for leave to file a second amended complaint (which only added one additional defendant), and granted Lundquist's motion for leave to file his first amended answer. [Tr. 1164-1166].

On June 16, 1995, Lundquist moved for summary judgment on his usury allegations. [Tr. 1135].

The deadline for filing amended pleadings passed on July 21, 1995. [Tr. 1454]

On July 24, 1995, the district court denied Lundquist's motion for summary judgment [Tr. 1031].

On September 20, 1995, Premier moved for summary judgment on its entire claim against Lundquist and on Lundquist's counterclaim against Premier for usury. [Tr. 900]

On September 21, 1995, without moving for leave or obtaining Premier's written consent, Lundquist filed a Second Amended Complaint and Amended Answer and Affirmative Defenses. [Tr. 882]. In this answer, Lundquist asserted affirmative defenses of 1) release; 2) breach of contract; 3) estoppel; 4) waiver; 5) laches; 6) failure of consideration; and 7) wrongful foreclosure. However, release, estoppel, breach of contract, waiver and failure of consideration were dropped as defenses when Defendant filed his First Amended Answer, Affirmative Defenses and Counterclaim.

On October 4, 1995, Premier moved to strike the Second Amended Answer.[Tr. 995]. On November 2, 1995, the district court held a hearing on Premier's motion, and thereafter, granted Premier's motion to strike Lundquist's

Second Amended Answer because Lundquist's failed to move for leave to amend or to show good cause for modifying the amendment of pleadings deadline and the scheduling order. Moreover, the trial court ordered Lundquist to file an amended answer asserting only the defenses of 1) promissory estoppel; 2) laches; 3) usury; and 4) that the Guaranty is not enforceable by its own terms.[Tr. 69; 539; 612]

On November 3, 1995, without moving for leave to exceed the court's leave to amend or obtaining Premier's written consent, Lundquist filed a Third Amended Answer and Affirmative Defenses and a Second Amended Counterclaim which asserted the defenses of 1) satisfaction by performance of the Guaranty; 2) waiver; 3) equitable and promissory estoppel; 4) laches; 5) setoff and offset; 6) alteration of indebtedness, and which included a counterclaim for usury. This answer asserted defenses beyond the district court's leave

as announced in its oral ruling on November 2, 1995. [Tr. 639].

On November 9, 1995, Premier moved to strike Lundquist's Third Amended Answer. [Tr. 628]

On November 20, 1995, the trial court granted Premier's motion to strike the Third Amended Answer. (Tr. 610)

On November 27, 1995, without Premier's written consent, Lundquist moved for leave to file an Fourth Amended Answer which contained new affirmative defenses. [Tr. 554]

On November 29, 1995, Lundquist supplemented his motion for leave to file the Fourth Amended Answer by seeking to withdraw reference to the defense of waiver in the fourth amended answer.[Tr. 550]. However, the fourth amended answer still contained affirmative defenses not allowed by the district court pursuant to its ruling on

November 2, 1995 [Tr. 554] and its order signed November 20, 1995. [Tr.610]. In particular, Lundquist failed to comply with these rulings by adding affirmative defenses of satisfaction by performance, material alteration, release of the Guaranty, and equitable estoppel., [Tr. 554]

On December 4, 1995, the district court denied leave for Lundquist to file his Fourth Amended Answer and granted Premier's motion for summary judgment. [Tr.542;610].

All of the foregoing crearly evidences Lundquist's access to due process of law.

B. The Trial Court did not Abuse its Discretion in Denying Leave to File and in Striking Lundquist's Unauthorized Amended Answers and Counterclaims.

Lundquist does not assign error to the district court's actions relating to this Fourth Amended Answer. Lndquist complains, however, that the court's actions in denying leave

to file his second and third amended answer and in striking these pleadings was erroneous and a denial of due process.

In reviewing whether a district court erred in refusing to permit the amendments of pleadings, an appellate court may reverse only upon a finding of an abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Halbert*, 33 F. 3d at 529; *Addinton v. Farmer's Elevator Mutual Ins.. Co.*, 650 F. 2d 663, 666 (5th Cir. 1981). A district court has some discretion to allow a late amendment when nc prejudice would result to the other party and the ends of justice so require. *Banc One Capital Partners Corp.v. Kneipper*, 67 F. 3d 1187, 1199(5th Cir. 1995).

Although FED. R.CIV. P. 15(a) evidences a bias in favor of granting leave to amend when justice requires, a decision to grant leave is not automatic and is within the discretion of the court. *Halbert*, 33 F. 3d at 529. In exercising its discretion, a court may consider such factors as "undue

delay, bad faith or dilatory motive" on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of the amendment. *Foman*, 371 U.S. 178; *State of Louisiana v. Litton Mortgage Co.*,50 F. 3d 1298, 1302 (5th Cir. 1995), citing *Whittaker v. City of Houston*, 963 F. 2d 831, 836 (5th Cir.1988).

In the present case, it is clear that undue delay, bad faith and dilatory motive each bore a role in the district court's denials of leave and of the striking of the various answers. Throughout Volume 10 of the Record, the district court's frustration is evident:

"...[a]and I told you how to file, Mr. Jordon, and you didn't do it, and you may not bring up these new matter after the pleading deadline, so now you don't have an answer. You want to file one and ask leave of court. I'll think about it then...

"...actually, whether he pleads it or not I have granted him the right to do I think four defenses and a counterclaim...

"I've granted him the right to assert those defenses and told him to plead them by a certain day. He didn't do it, he wanted to add some more fraud, some more accidents and mistakes, which was not pled certainly before the deadline and is not going to be plead now...

"Well, I really, Mr. Jordon, the Court, this is trying the patience of the Court. We have these hearings and you tell me what your defenses are and your counterclaim and I said all we need to do is see them up in writing, and I grant you leave to do it well after the deadline passed, mind you. I grant you leave to do it and we still end up with new elements thrown in here, and I am going to keep striking them until you make a good faith attempt to comply with the Court's order." [Tr.96, p.10-12]

The district court in the present case ruled in the same manner affirmed by this court in *State of Louisiana v. Litton Mortgage Company*, 50 F. 3d 1298. By asserting, abandoning and attempting to reassert the same defenses previously withdrawn, and by exceeding the leave granted by the district court, Lundquist's actions in this case indicated "bad faith and a dilatory motive at worst and weak attempts at artful pleading. *Id.* at 1304.

Moreover, the District Court acted in accordance with this Supreme Court's holding in *Foman* that a court may deny leave to amend where there is undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of the amendment. *Foman*, 371 U.S. 178. Lundquist acted in bad faith and repeatedly failed to cure his amended pleadings.

Lundquist has failed to demonstrate that the trial court abused its discretion or denied Lundquist due process of law by denying any motion for leave to file an amended answer or in striking the second, third and fourth amended answers. Prejudice would result to Premier as a result of his late amendments. The issues had already been narrowed once by pleading amendment. The pleading amendment deadline had passed. The district court had disposed of Lundquist's usury defenses and counterclaim by summary judgment. Premier had filed its Motion for Summary Judgment. The interests of justice did not require that Lundquist's amendments be allowed. *Bank One Capital partners Corp v. Kneipper*, 67 F. 3d 1187 (5th Cir. 1995); *Pope v. MCI Telecommunications Corp.*, 937 *F. 2d 258 (5th Cir. 1991), cert.denied,504 U.S. 916.*

Lundquist attempts to cast blame upon Premier for his pleading failures due to Premier's alleged lateness in filing

disclosures required pursuant to Fed. R. Civ. P. 26. However, Lundquist himself failed to timely file Rule 26 disclosures and cannot now complain of Premier's action in this regard. [Tr. 516]. Moreover, the very defense which Lundquist so strenuously argues should have been considered was not something that Premier's disclosures would have revealed. Specifically, Lundquist's second , third and fourth amended answers center in large part on the alleged parol agreement Victoria Savings Association, F.S.A. that the Guaranty would be released within a year. This alleged oral agreement contradicts premier's records and only Lundquist himself would have any knowledge of this alleged conversation.

C. Summary Judgment was Proper because Lundquist's Defenses of Laches, Promissory Estoppel, and Equitable Estoppel are Barred as a Matter of Law

1. Laches and Equitable Estoppel

Lundquist asserts that Premier's cause of action on the guaranty is barred by the doctrine of laches. Lundquist

intertwines his laches defense with his unpled and abandoned affirmative defenses of promissory estoppel and equitable estoppel. Lundquist bases these defenses on three premises. Lundquist asserts that 1) Premier failed to bring suit for almost eleven (11) years; 2) the RTC failed to deny "the notice by Lundquist in 1989 of his non-liability; and 3) Lundquist and a representative at Victoria Savings Association, F.S.A., entered into an alleged oral agreement consistent with his interpretation of the Guaranty that Lundquist would not be liable for renewals and extensions of the Note. Lundquist, however, has failed to raise a genuine issue of material fact as to these issues. In addition to his pleading omissions, the language of the Guaranty, the common law pertaining to laches, the parol evidence rule and the hearsay rule each preclude Lundquist's defenses.

Lundquist again ignores the terms of the Guaranty as they relate to his laches defense:

"Guarantors hereby agree that the Lender may, from time to time, without notice to the Guarantors at its discretion, and with or without valuable consideration, renew, extend, or change the time of payment and/or the manner, place or terms of payment of said promissory note, or any part thereof, allow substitution or withdrawal of any collateral, or may release any security held in connection with the promissory note or any person or party liable thereon; and *the exercise of the Lender of any right or power conferred upon it by any agreement with any of the Borrowers or with any of the Guarantors individually or with any other person or party shall be wholly discretionary with the Lender, in such exercise of, or failure to exercise, such right or power*

shall in no way impair or diminish the obligation and liability of the Guarantors hereunder..."

"The Lender, its succesor and assigns, shall not be liable for failure to use diligence in collection of any amounts due or which may become due under the terms of said promissory note hereby guaranteed, or pursuing the liability of any person under said promissory note or this guaranty; and the Guarantors hereby expressly waive notice to the Guarantors of acceptance of this guaranty, presentment for payments, notice of dishonor, notice of protest, and notice of said promissory note, *diligence in bringing suit against any person, natural of artificial, liable on said promissory note or this guaranty and*

waive notice of or consent to any act of forbearance by the [Lender], any renewal extensions rearrangement or assignment of said promissory note." *(Emphasis added.) [Tr. 1075]*

Thus, even if Lundquist had a valid defense of laches, he has waived such a defense based on any action or inaction of the lender and its assignee Premier. [Tr. 1074-1077].

Lundquist's laches defense is inextricably tied to his untenable position that the Guaranty did not apply to extensions and renewals, and thus ignores the effect on the timing of filing suit. Pursuant to the extension and renewal agreements, the maturity date of the loan was extended to September 19, 1987 [Tr. 964]. Victoria Savings Association, F.S.A. went into receivership under the Resolution Trust Corporation ("RTC") on June 29, 1989. [Tr. 509]. Premier is a successor and assign of the RTC. [Tr. 163]. As a matter

of law, Premier, as a successor in interest to the RTC, had six years from that date to bring suit on the Note and Guaranty. *Jackson v. Thrweatt*, 883 S.W. 2d 171 (Tex. 1994). Lundquist does not assign error to the district court's ruling on the statute of limitations.

Laches is an equitable defense and may not be used against the enforcement of a purely legal right. *Federal Deposit Ins.. Corp. v. Fuller*, 994 F. 2d 223, 224 (5th Cir. 1993); *Dillard v. Broyles*, 633 S.W. 2d 636, 645 (Tex. App.-- Corpus Christi 1982, writ ref'd n.r.e.), *cert. denied*, 463 U.S. 1208 (1983). In addition, laches does not apply to a cause of action, whether legal or equitable, that comes within a specific provision of the statute of limitations absent extraordinary circumstances. *Clark v. Amoco Production Co.*, 794 F. 2d 967, 971 (5th Cir. 1986); *Dillard*, 633 S.W. 2d at 645. In the present case, Premier sued Lundquist for breach of a guaranty (a legal cause of action) within the time frame imposed by

specific limitations provisions. As such, Lundquist's attempt to claim laches fails as a matter of law.

Lundquist disputes that laches is available only when an action does not come within the provisions of a particular statue of limitations. Lundquist furthermore states that laches occurs when there is an unreasonably long delay in asserting legal or equitable rights and the defendant has in good faith made change of position to his detriment because of the delay. Lundquist failed to demonstrate any "good faith change of position to this detriment" because of the alleged delay. A mere self-serving letter that one is not liable is hardly such a good faith change of position. *Bluebonnet Sav. Bank v. Grayridge Apt. Homes, Inc.* 907 S.W. 2d 904, 912 (Tex. App.--Houston [1st Dist] 1995, no writ). Moreover, based on the extensions of the Note, there was no unreasonable delay as matter of law.

To support his laches argument, Lundquist cites the following cases: *Barfield v. Howard M. Smith Company*, 426 S.W. 2d 834, 840 (Tex. 1968); *Helsley v. Anderson*, 519 S.W. 130, 133-134 (Tex. Civ. App. --Dallas 1975, no writ); *Buzbee v. Castlewood Civic Club*, 737 S.W. 2d 366, 369 (Tex. App.--Houston [4th Dist.] 1987, no writ); *Murray v. San Jacinto Agency, Inc.*, 800 S.W. 2d 826, 828 (1990); *City of Forth Worth v. Johnson*, 388 S.W. 2d 400, 403 (1964); *DeBenavides v. Warren*, 674 S.W. 2d 353, 362 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.). However, none of the cases cited by Lundquist pertain to written guaranties and none involve contracts with waiver provisions.

2. Promissory Estoppel

Lundquist asserts that the trial court erred in granting summary judgment in favor of Premier because a fact question exists as to promissory estoppel. Estoppel was not among the defenses before the court because it was not plead in

Lundquist's First Amended Answer. [Tr. 1418] However, even if considered, Lundquist's estoppel defense fails to present a genuine issue of material fact precluding summary judgment in favor or Premier.

(a) The Parol Evidence Rule

Lundquist argues that parol evidence may be admitted to show his allege oral agreement with Sam Beagle, an agent of Victoria Savings Association, F.S.A., that the Guaranty would be released in one year. Lundquist admits that the parol evidence rule may not be used to contradict the terms of a written agreement and that the Guaranty is ambiguous. Lundquist, instead, contends that the Guaranty does not address renewals and his alleged agreement is a collateral agreement naturally not included in the Guaranty itself.

The Guaranty, however, addresses renewals and extensions. Lundquist expressly consented to remain liable for renewals and extensions based on the unambiguous language

of the Guaranty and parol evidence is inadmissible to vary such terms. To reiterate, the Guaranty expressly states: "Guarantors hereby expressly...consent to any act of forbearance by the [Lender], and any renewal, extensions, rearrangement or assignment of said promissory note." [Tr.1075]

Thus, to the extent that the Guaranty itself speaks to the agreement as to whether the Guaranty covered renewals and extensions, any "collateral agreement" which would vary these terms must be excluded. *Town North Nat'l Bank v. Broaddus*, 569 S.W. 2d 489 (Tex. 1978); *Transit Enterprises, Inc.v. Addicks Tire & Supply, Inc.*, 725 S.W. 2d 459, 461 (Tex. App.--Houston [1st Dist.] 1987, no wirt). Because Lundquist's assertion directly contradicts the terms of the Guaranty, it is inadmissible. Moreover, because this issue was addressed, it is not a collateral agreement.

(b) Hearsay

In addition to being inadmissible based on the parol evidence rule, Lundquist's statements regarding representations allegedly made by a Victoria Association, F.S.A representative are hearsay. FED. R. CIV. EVID. 801 (c). Victoria Savings Association, F.S.

A. Is not a party to this lawsuit, and thus, any representations do not constitute admissions by a party opponent. FED. R. CIV. EVID. 801 (d)(2). Moreover, under Texas law, a representation that a guarantor will be liable on a guaranty is inadmissible and inadequate to defeat the plain language of the Guaranty. *E.g Dean v. Allied Oil Co.*, 261 S.W. 2d 900 (Tex. Civ. App.--Waco 1953, writ dism'd).

Prayer

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny Lundquist's Petition for Writ of Certiorari and affirm the judgment of the District

court. Further, Respondent requests such other and further relief, at law or in equity, to which it may show itself entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Opposition to Petition for A Writ of Certiorari has been served by certified mail, return receipt requested, to:

Shelby A. Jordan
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900 NationsBank Center North
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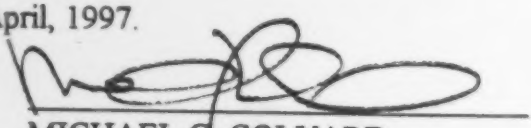
on the 16th day of April, 1997.



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